

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Preston*, 2021 NSSC 212

**Date:** 20210625

**Docket:** *Halifax*, No. 498703

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Kyle James Preston

**Restriction on Publication: 486.4 cc**

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**TRIAL DECISION**

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**Judge:** The Honourable Justice Joshua Arnold

**Heard:** April 6, 7, 8, and 9, 2021, in Halifax, Nova Scotia

**Counsel:** Alicia Kennedy and Yan Lu, for the Provincial Crown  
Thomas Singleton and Leora Lawson, for Kyle Preston

## Overview

[1] Kyle Preston is charged with sexually assaulting S.B. in 2018, when they were both 19 years old. They were former work colleagues, were not well-known to each other and, after exchanging electronic messages in the early morning hours, at S.B.'s invitation Mr. Preston picked her up in his car at her home and they parked behind a recreation center.

[2] After some consensual sexual activity in the front seat of the car, by agreement they moved to the back seat, where they eventually had unprotected vaginal intercourse. S.B. says she did not consent to vaginal intercourse. Mr. Preston says she did consent. Mr. Preston then dropped S.B. off at home and went home to sleep.

[3] Later that day S.B. and the accused exchanged text messages in which S.B. accused Mr. Preston of having intercourse with her without her consent, and Mr. Preston apologized, referring to himself as a "monster". At trial he testified that due to mental health issues, when confronted with stressful situations he tries to de-escalate by taking the blame and apologizing, even if he has done nothing wrong.

## Facts

[4] Kyle Preston is charged:

That he on or about the 4<sup>th</sup> day of August 2018 at, or near Lakeside in Halifax Regional Municipality, in the Province of Nova Scotia, did unlawfully commit a sexual assault on S.B., contrary to Section 271 of the Criminal Code.

[5] S.B. and Kyle Preston worked in separate departments at a large recreation center for several months, and had spoken a few times. S.B. left in March 2018 and did not return, but Mr. Preston continued to work there. S.B.'s aunt, D.C., was his supervisor.

[6] On Saturday, August 4, 2018, Mr. Preston was at home, playing video games remotely with friends. S.B. had been out socializing and came home around 1:00 AM. She sat outside in her backyard with her phone, and posted a video on Instagram of herself doing a viral dance. Mr. Preston made an electronic comment about the video. This led to texting between them, then communicating via Snapchat, an application where pictures and messages disappear after they are opened. S.B. invited Mr. Preston to come to her place. Mr. Preston said that

initially he was not sure he wanted to leave home. S.B. then sent him a photo via Snapchat with a caption to the effect of “We should fuck tonight”, and he then quickly decided to go to her place. S.B. sent Mr. Preston her civic address around 1:30 AM.

[7] Mr. Preston drove to S.B.’s house, arriving around 1:40 PM, texted her, and she came out and got into his vehicle. There is some disagreement about what the parties said to each other. S.B. testified that she told Mr. Preston that they were not going to have intercourse that night. She said that she falsely told him that she was having her period, to dissuade him from expecting intercourse. She also said that she told Mr. Preston they could hang around her house, but he drove off with her instead. Mr. Preston denied that the conversation about intercourse or her period occurred. He said S.B. got into his car, he asked her if she wanted to go for a drive, and she said “sure”.

[8] Mr. Preston drove to a city recreation center and parked in a dark and deserted location behind the building. However, the municipality had video equipment around the exterior of the building, and some of the events were captured on video. The car parked at 2:04:26 AM. Mr. Preston was in the driver’s seat and S.B. in the front passenger seat, with a center console between them. They agree that for the first few minutes they sat in the car without much interaction, each using their phones. While there is some disagreement as to who initiated the first kiss, their evidence is in general agreement that for about the next thirty minutes they were consensually kissing and touching each other, both on top of and under their clothes.

[9] Eventually, Mr. Preston suggested they move to the back seat, and S.B. agreed. On the surveillance video, about 35 minutes after they parked, at 2:39:10 AM, Mr. Preston can be seen getting out of the vehicle with his pants open and his penis exposed, then wiping off his penis and then getting into the back seat through the rear driver’s side door. S.B. climbed over the center console into the back seat. They continued to kiss and touch. It is at this point that the evidence of S.B. and Mr. Preston diverges significantly.

### **S.B.’s version**

[10] According to S.B., she repeatedly told Mr. Preston that they were not going to have intercourse. While they were kissing in the back seat, however, he pulled her leggings off and tossed them into the front seat. She said she does not believe she was wearing underwear. S.B. said she told him that just because her pants

were off did not mean they were going to have intercourse. She said Mr. Preston was on top of her and pushed his penis into her vagina three times without her consent, and each time she grabbed his penis, pulled it out of her vagina, and told him to stop. Mr. Preston eventually stopped and got out of the vehicle. Describing these events, S.B. stated variously, in her direct examination:

Q. So did you want him to kiss you at that time?

A. I didn't initiate it but, when he did it, I was okay with it. I kissed him back, like, there was no objection to it.

Q. Okay and what happens from there?

A. From there, we made out a little bit. There was some touching and then he asked me if I wanted to go into the back seat and I said yes. I remember he got out of the car and went around to get into the back. I just went through between the seats. And we continued to make out and then he started trying to pull my pants down and I kept telling him "no" and that I didn't want to do anything more.

...

Q. Can you just explain that for the Court?

A. He was asking about it and I gave him the same answer that I did over Snapchat – that it wasn't going to happen tonight.

Q. Did you say anything else to him?

A. I again told him that I was on my period.

Q. So, once you get to the back seat, can you just explain for the Court what, if anything, happens in the back seat?

A. So, I said before, we were making out and touching a little bit and then he pulled my pants down and I had told him that, "just because you're taking my pants off, doesn't mean that we're going to have sex".

Q. How did he respond when you said that to him?

A. I don't quite remember.

...

Q. Okay, so do you recall now what, if anything, did he say or do at that time?

A. Uh, yeah, so after I had told him that it meant we weren't having sex, um, he continued to say that I was being a tease, um, when I told him that I wasn't and that I was serious and that it wasn't going to happen this time. Maybe next time, but I was very serious about me having no pants on does not mean that we are going to have sex tonight.

...

Q. And can you explain for the court, how it was that he removed your pants in the back seat of the car?

A. So, I was half laid down. I was propped up on my elbow, just because when we were making out, he was more on top of me. So then when he sat up, he was able to grab my pants and pull them off.

Q. And what happens from there?

A. I had told him “no”, and he didn’t care. It’s when he started to try and have sex with me, and I had kind of pushed him off and I was like “no, I told you no”, and then, against what I had said, he took his penis and inserted it into me.

Q. When you say he inserted it into you, what exactly do you mean?

A. Into my vagina.

Q. And how long was this after you had told him “no”?

A. Probably a minute or two.

Q. And how long was this after he removed your pants?

A. Just a few minutes.

Q. Did you consent to him putting his penis in your vagina at that time?

A. No.

Q. At the time that he put his penis in your vagina, did you have any other clothing on?

A. I had on my top and I believe, no, I believe that was it. I don’t think I was wearing anything under my pants.

Q. When he puts his penis in your vagina, do you say anything to him?

A. Yeah, I told him to stop and that I didn’t want to.

Q. And did you do anything at that time?

A. I...actually I reached down and grabbed his penis and took it out of my vagina.

Q. Did he say anything at the time that you did that?

A. I don’t believe so.

Q. What happened after you removed his penis from your vagina?

A. He put it back in. I removed it two or three times.

...

Q. And, S., are you able to say from the time that he first put his penis in your vagina, are you able to say how long that went on – that you removed it two to three times?

A. Not a certain amount of time, but it was just a few minutes.

Q. And how were you feeling at the time?

A. Scared.

Q. And, it's going to seem like a silly question, but why exactly were you feeling scared?

A. Because I had told him "no" and I wasn't listened to, it was something I didn't want to do.

Q. Other than taking his penis out of your vagina, did you do anything to try to get him to stop? Anything else?

A. Yes. I was pushing on his chest and I had repeatedly said, like, "no, this isn't happening tonight". I had tried to move, but it was a very compromised situation.

Q. What do you mean by that – it was a very compromised situation?

A. It was a very tight space and he was above me and my back was to the door of the car. There wasn't really anywheres that I could go.

Q. When he put his penis in your vagina, was he wearing a condom?

A. No.

Q. And you've said you can't say exactly how long that went on?

A. Yeah.

Q. Did it eventually come to an end?

A. Yes.

Q. How did it come to an end?

A. He just stopped.

Q. Do you know, did he ejaculate?

A. I don't know.

[11] During cross-examination the following exchanges occurred about the issue of whether S.B. consented to intercourse:

Q. So, your testimony is he starts pulling your pants down?

A. Yes.

Q. Are you wearing underwear?

A. I don't believe so.

Q. And do you lift yourself up a bit so he can get your pants down?

A. No.

...

Q. So, is your testimony that he pulled your pants all the way off?

A. Yes.

Q. Where do your pants end up?

A. In the front seat.

Q. How did they get to the front seat?

A. Kyle put them there.

...

Q. Okay. So, do you say anything when Kyle is pulling your pants down?

A. Yes.

Q. What do you say?

A. I told him that "just because you took off my pants does not mean we're having sex tonight".

Q. Did he say anything?

A. He told me I was being a tease.

...

Q. Okay and so would it be fair for me to say that after that discussion, he started taking your pants off and you lifted yourself up to let him take your pants off?

A. No, I did not lift myself up.

Q. Okay, is that "I did not lift myself up" or "I don't recall if I did or not"?

A. I did not lift myself up.

Q. So after your pants are off, what's the next thing that happens?

A. After my pants are off, I made the statement that "just because my pants are off does not mean that we're having sex", he continued to, you know, feel me. He did finger me and that's when he kinda found out that I was lying about being on my period and that's when he decided that he was going to have sex with me.

Q. You said that's when he found out that you were lying about being on your period. Was that because he had his fingers in you and there was no blood?

A. Yes.

...

Q. And you told us earlier that your reason for telling him you were on period was you didn't want to have sex?

A. Yes.

Q. Okay. And so, when the discussion took place in the back seat of the car, and it's clear you're not on your period, isn't that when you said to him, "I had only said that, I'm really not on my period and it's all okay"?

A. That was never said.

Q. You're saying you never said that?

A. I'm saying I never said that.

...

Q. And did you reach your hand out and guide his penis inside you?

A. No, the opposite. I took it out of me.

Q. So you took it out and, what did you do, you reached your hand down and pushed it out of you?

A. Yes, I grabbed his penis, and I took it out of me.

Q. Okay. Did he say anything?

A. I don't believe.

Q. I think your evidence was that he put his penis back inside you.

A. Yes, after I had said I "no".

Q. Sorry?

A. After I had told him "no".

Q. Did you have your arms around his back?

A. No.

Q. Did you have your arms around his back at any time while you were in the back seat?

A. No.

Q. Do you say anything to him?

A. Yes. I told him to stop and that this wasn't going to happen, and he kept telling me that I was being a tease.

Q. When he put his penis inside you, did you scream at him?

A. I didn't scream, no.

Q. Did you try to punch him?

A. I pushed on his chest.

Q. Sorry?

A. I pushed on his chest to get him off of me.

Q. You pushed on his chest, but did you try to punch him with your fist?



A. No.

[12] S.B. was also cross-examined regarding her report to the police and the notes taken by Constable Dupre:

Q. And part of his notes, and these are his notes, and I'm just going to read something to you and you can tell me if you would have said that or not:

“Kyle vaginally penetrated her. S.B. screamed, punched, and pushed trying to get him off her.”

That's what Cst. Dupre says in his notes about talking to you on the evening of August 15, 2018, at your home.

A. Yeah, that's not correct.

Q. That's not correct?

A. No. I didn't punch him, I didn't yell, I did not want to escalate the situation.

Q. But, I mean, why would you tell that to Cst. Dupre?

A. I didn't.

Q. You didn't?

A. No.

[13] S.B. was questioned about what happened after the intercourse:

Q. So you say he just stopped. And what happened from there?

A. We sat there for a minute. I didn't really say anything, I just wanted to get home. And then we realized that it was late, so he decided to take me home.

...

Q. And, so, what happens when you're both back in the front of the vehicle?

A. He had tried to make conversation with me. I was very panicked, so I didn't really say much.

Q. When you say you were panicked, were you showing him that you were panicked?

A. I was trying not to, 'cause I didn't know if things would escalate, if he would get mad or...I just wanted to get home and get away from him.

[14] S.B. said that she retrieved her pants from the front seat, put them on in the car and then got out of the car, walked to the front passenger seat, and got in. Mr. Preston drove her home, she got out right away, and went inside. S.B. said that she

tried to connect with her friend C.S. via text. She also said that once she got out of Mr. Preston's car she became upset and spoke to her aunt, D.C., and her mother:

Q. At any point in what you've described to the Court, at any point when you were telling Kyle Preston, "no", or pushing him, or removing his penis from your vagina, did he – did any of that seem to change his behaviour in any way?

A. No.

Q. So he takes you back to your mother's home?

A. Yes.

Q. Can you just explain for the Court what happens there?

A. I – we said "bye" and I got out, then I went inside. I was still texting with C.S. and then I had messaged my aunt, because I didn't want to go tell my mom.

Q. And who is your aunt?

A. D.

Q. What is D.'s last name?

A. C.

Q. You said you didn't want to tell your mom?

A. Yeah.

Q. Why was that?

A. I was scared.

Q. And did you exchange messages with your aunt?

A. Yes.

Q. And what was your state when you were back in your mother's home?

A. As soon as I got out of the car, I started to cry and then I went inside and sat on the couch and I tried to understand what had just happened. And I just couldn't calm down. I cried that...the whole rest of that night.

[15] S.B. said when she got into her house she called her aunt, D.C., to talk about what had happened, and eventually told her mother. D.C. testified that S.B. had tried to call her once, but she was asleep and missed the first call. She said that S.B. tried her for a second time around 3:30 AM. This time D.C. answered the phone and spoke to S.B. D.C. said that she spoke to S.B. on the phone about an hour before they started texting. The first text from D.C. to S.B. was at 4:40 AM.

[16] Later that day S.B. exchanged text messages with Mr. Preston.

[17] D.C. took S.B. to the police station on Gottingen Street in Halifax, about a week-and-a-half after the alleged incident. S.B. waited, but nobody talked to her, so she left and later called the non-emergency line. S.B. gave a formal statement to Constable Ryan Dupre on the evening of August 15, 2018.

### **Kyle Preston's Version**

[18] Mr. Preston testified that after consensual kissing and touching in the front seat, he suggested they move to the back seat. S.B. climbed through the seats, while he exited the car and got in through the back door. In the back seat he asked S.B. to take her clothes off, which she did. He said she mainly took her own leggings down, but that he helped her remove them when they got stuck around her ankles. He said she took her own shirt off, but left her bra on. They went back to kissing and touching each other. He said that when he put his fingers in her vagina she said that it was alright because she was at the end of her period. Mr. Preston said that S.B. then removed her own underpants and he continued kissing her and putting his fingers in her vagina. He said S.B. used one hand to pull on the waistband of his shorts, and he took that as direction to undress, and removed all of his clothes except his socks.

[19] Mr. Preston then said that S.B. put her hand around his penis and guided it toward her vagina. He said that he rubbed her thigh and her vagina with his penis, and she then guided his penis into her vagina. He said she said nothing, but that she was moaning with pleasure. Mr. Preston gave the following account during his direct testimony:

Q. So Kyle, you've gotten into the back seat and where is S.?

A. S. is also in the back seat, that's behind the passenger front seat, so in the right back seat.

Q. Okay and what's she doing?

A. So we go back to kissing each other and I noticed that there was a hole in her leggings on the inner thigh, near the crotch area, and I started fingering her again through the hole in...in her leggings and she was grabbing, rubbing my penis again and we continued to kiss and do this for a few minutes. And I ask her if she would take her clothes off and she said, "sure" and she continues to take her clothes off.

Q. Okay, what clothes did she continue to take off?

A. So first she took off her leggings, her leggings were around her ankles and I helped her with the leggings over the ankles. Then she took off her sweater. She left her bra on and I believe she left her socks on as well.

Q. Were you involved in taking off her leggings?

A. Around the ankles, 'cause they were stuck over her sandals, I helped her there, but I did not pull them down. She initiated that.

Q. And what about you, are you still dressed?

A. Yes, I am still dressed at this point. When she does take off her leggings and her sweater, we continue to go back to kissing and fingering. I'm fingering her and she's grabbing onto my penis and that goes on for a few more minutes. And then she mentioned to me that she was near the end on her period. And I said...I said, "okay, that's no worries" and at that point, she took off her underwear – she had white underwear on – and she started pulling...she started laying down on her...on her back, towards, like, leaning, like, on the door, and I'm sort of, like, overtop, holding my...my weight with my left arm on the ground of the car. And we're...we're continuing to kiss and I'm fingering her, she's grabbing onto my waistband of...the waistband of the denim shorts that I was wearing, the jean shorts I was wearing. And she had one hand on my hip, which was her right hand.

Q. Okay, what happens?

A. After her pulling on my jean shorts, I take them off and I get completely naked other than my socks.

Q. Okay and so your clothing is off. What happens then?

A. So I go back over...over her and we continue to kiss, I'm fingering her, and she starts rubbing my penis towards her vagina, she's, like, guiding and rubbing my penis towards her vagina. At that point, I sit up a little bit and I start rubbing my penis on her inner thigh and on her vagina and then we start having sex.

Q. So, "we started to have sex".

A. Yes.

Q. So, who was doing what?

A. So, my penis was in her vagina.

Q. How did your penis get in her vagina?

A. She guided my penis into her vagina, and she was laying on her back and I was slightly over her.

Q. Now, does she say anything to you at this point?

A. She's not saying anything, but she is moaning from the pleasure of sex.

Q. You heard S. testify...

A. Yes.

Q. ...that she had said to you, "just because my pants are off doesn't mean we're going to have sex".

A. She never said that.

Q. You're saying that was never said?

A. That was never said.

Q. Now, you heard her testify that she was asking you to stop.

A. Yes.

Q. Did that happen?

A. No, sir.

Q. You heard S. testify that she was trying to push you off her.

A. I did hear.

Q. Did that happen?

A. No, sir.

Q. You heard S. testify that she reached down several times and pulled your penis out of her. Did that happen?

A. No, sir.

Q. So your penis is inside of her and can you describe what she is doing when your penis is inside of her?

A. Yeah, so she has her arms wrapped around my back and she is moaning.

Q. And how long does that continue for?

A. The...us having sex it lasted, I would say, anywhere between five and 10 minutes.

Q. And how do things end?

A. I ejaculate on her right thigh, so the one that's closest to the seat, and I wipe off my...the remaining semen off my penis...

Q. With what?

A. ...with my hand.

Q. And what's she doing?

A. So she's sitting up and she's wiping the...the semen off her thigh with a piece of clothing.

[20] Mr. Preston was then asked about consent:

Q. I want you to explain to Justice Arnold why you believe that S.B. was consenting to having sex with you in the back seat of that white car.

A. For sure. So, I believe the consent started in the front seat of the car. It started when she leaned over and started kissing me, when she was grabbing onto my penis and rubbing my penis over my clothing. She grabbed my hand, my right hand, and put it underneath her sweater and I was grabbing onto her breasts, which led to her grabbing my hand and putting it under her...her leggings and I started fingering her. She was enjoying it, taking pleasure, and ask her if she wants to go into the back seat and she...she agrees. And we continue to...I continue to finger her in the back seat of the car and continue to kiss her and she's continuing to rub on my penis. And that continues and I ask her if she would like to take off her clothing and she agrees, she says "sure". At that point, she takes her clothing off and we continue fooling around, I'm fingering her, she's rubbing on my penis, which is under my clothing, and we're...we're kissing. That leads to her pulling on my...the waistband of my jean shorts and at that point I take off my clothing and we continue to go back, fingering, kissing, and rubbing my penis, and at that point, she's...she's guiding my body into her body. She guide my penis into her vagina after I was rubbing my penis on the side of her thigh and the...and the inner lips of her vagina and to me, her actions showed that she was consenting and while we were having sex, there was no indication of pushing, shoving, or she never even said "stop". But her arms were wrapped around my back, embracing me.

Q. So did you honestly believe that she was consenting to what was going on?

A. Yes, sir.

[21] On cross-examination, Mr. Preston maintained that there was no actual conversation about intercourse, but that S.B.'s actions indicated consent to that activity:

Q. Okay, and kissing you and that she was pulling at your waistband that you also believe that that meant she was consenting to penetrative vaginal sex?

A. So, what I believe that she was consenting to was when she was guiding my penis into her vagina.

Q. Okay. And you say that she guided your penis into her vagina?

A. Correct.

Q. And you say that she never said, "Stop"?

A. That's correct.

Q. And when my friend asked you, you say she didn't say "no".

A. That's correct.

Q. And she didn't push you off?

A. That is correct.

Q. And she didn't say, "just because my pants are off doesn't mean we're having sex"?

A. She never said that.

Q. And you say she didn't pull you...pull your penis out of her?

A. That is true. She never did.

Q. Now, Mr. Preston, at the time that you were putting your penis in Ms. B.'s vagina, she wasn't saying anything at all, was she?

A. I never put my penis inside her vagina. She put my penis inside her vagina.

Q. Okay so according to you, you never put your penis into her vagina.

A. Yes, that is true.

Q. Okay, you're on top of her, correct?

A. I am above her, yes.

Q. She's underneath you?

A. Yes.

Q. Okay and let me ask you this way: At the time that your penis is in her vagina, she's not saying anything to you at all, correct?

A. She is...she is moaning.

Q. Okay, so according to you today she is moaning when that's happening?

A. Correct.

[22] Mr. Preston was further directed to certain passages of his police statement:

Q. And it began, if you look again at page 65 of your statement, at line 17, Cst. Rideout asked you, "Okay, did she mention anything about being on her period?" and you said, "She did," "And..." he says, and then you say, "And then she...I asked her 'was it toward the beginning or the end?' and she was like 'toward the end' she thought. I was like, that's fine, I don't-I don't mind," and he said, "Um-hmm".

...

Q. And then it continues over onto page 66, you say, "I wasn't going to do anything orally anyway," he says, "Yeah," and you say, "And she said, 'okay,' so I was fingering her and then I kept looking at my hand because I thought, like, you know [inaudible] or not," he says, "Right," and then you say, "There wasn't and I said, 'are you sure you're on your period?', she's like 'I thought I was, I thought I was at the end,' I was like, 'Oh, okay,' but she did, we did have that conversation, yes". You'd agree with me that's what you told Cst. Rideout in September of 2018?

A. Correct.

Q. And that's a lot more than just simply, "No worries," correct?

A. Yep. That was something that I had forgotten.

...

Q. You told the Court today that as things go along, and you talked about her having her hand in the waistband of your shorts, and then you said she was rubbing your penis and guiding it towards her vagina.

A. Correct.

Q. And then you said you touched your penis on her inner thigh and then on her vagina. Did I understand your evidence correctly about that?

A. You did.

Q. And so, I'm just going to direct you to page 60 of your statement.

A. Okay.

Q. And Cst. Rideout asked you, if you look at line 14 this is after the point at which you say that S.B. had taken her clothes off and grabbed your hand and he asked you, "Did she say any words to you that says..." and you said, "Not at all," and he asks you again, "Or even words that told you this...we're doing this tonight, was there anything said to you?" And then you answer to Cst. Rideout was, "No, and at first like...like, I didn't just, like, go straight in [inaudible]" do you see that there?

A. I do.

Q. And that's correct, isn't it? There were no words spoken at that point by S.B.?

A. No. There was no words.

Q. And Cst. Rideout says, "Um-hmm," and then you say at line 21, "like, I kind of played around" and he says, "Yeah," and you say, "With it, just in case, like, there ever was," and he says, "Yeah," and you say, "I always do that, so like, I just [inaudible] my dick and I just like...like rubbed her leg...[gesturing with hand motions]" and says, "Um-hmm," and then you say, "...stuff like that and then rubbed her vagina and she didn't say anything". Those are your words, Mr. Preston?

A. Correct.

Q. Okay and so you, S.B. is not saying anything to you and you take your penis and you rub it on her leg?

A. I did rub it on her leg.

Q. And she doesn't say anything?

A. That is correct.



Q. And you interpret that as she...you can continue.

A. From her actions of the way that she was guiding me, that is what I took from...continuing.

Q. But it's certainly not from her words because she is completely silent at this point, correct?

A. Uh, she did not say anything.

Q. And then you take your penis and you rub it on her vagina.

A. That is correct.

Q. And again, she is completely silent and she does not say anything.

A. That is correct.

Q. Okay and then Cst. Rideout asked you, "Well did she smile, did she say..." and your answer to him was, "I wasn't looking at her. I was looking down".

A. Yes, that's true.

Q. So at the point that you have your penis and you're rubbing it against her vagina, you're not looking at S.B.'s face?

A. I'm looking down.

...

Q. And you certainly at any point didn't ask her if it was okay to have sex with her?

A. There was no verbal conversation, but there was physical movements by S.B. that indicated what she wanted and what we were both consenting to.

[23] Mr. Preston also confirmed on cross-examination that he did not know S.B. well when this occurred. Asked if they had spoken at work "a couple of times", he responded that they had spoken "a few times, every now and then". He was then directed to his September 2018 police statement:

Q. And so, today you've told us that you met S.B. in October or November.

A. Correct.

Q. Okay, but you didn't tell Cst. Rideout that.

A. Okay.

Q. Do you agree with me?

A. I started working there in October-November and that's when I met her.

Q. Well, I'm going to suggest to you that what you said to Cst. Rideout is that you said you, "didn't really know her all that well, to be quite honest, and you talked to her at work a couple of times".

A. Yes.

...

Q. And in the same line of questions where Cst. Rideout is trying to establish with you how well you know S.B., you also told Cst. Rideout, "You know, before she was going away and briefly in March, I talked to her for a little bit". Do you see that there at line 16?

A. I do.

Q. Those are your words?

A. Yup.

Q. "And then at the end of March, I got into a relationship with a girl and so, but yeah, I really haven't talked to her all that much."

A. Yes.

Q. Correct?

A. Correct.

[24] Mr. Preston described where his car was parked when the incident occurred. This related to whether or not S.B. could have easily exited the back seat of the vehicle from her position. He said:

Q. So and in your statement to Cst. Rideout at page 23...and at the bottom of this page, at line 21, you say, "At this point," and this is...you're referring to this point after you're done in the backseat, "At this point she opens the door to get out of the back passenger seat. I reposition my car because the way that my front door was on her side, well it hit something," and continue on to page 24, "so that's why she didn't originally, there was, like, a garbage bin there and that's why she didn't open the door before so I realigned the car. She gets in, we started driving off." So, you told Cst. Rideout at the time that you had to realign the car before S.B. could get back in the passenger seat in the front, correct?

A. That's correct, from my memory.

Q. And then at page 43 of your statement, Mr. Preston, at line 3, again we're talking about the period of time where you're done in the back seat of the car and you said to Cst. Rideout, "I believe she gets out of the car, I repositioned my car because there was a green garbage bin right outside the passenger, like, front seat passenger door," and he says, "Right," and you said, "And I back up and then she gets in and then we started driving off". Do you recall saying that to Cst. Rideout?

A. I do.

Q. So before you had seen the video, you told Cst. Rideout that you had to reposition your car, you had to back up in order for S.B. to get into the passenger seat, you'd agree?

A. From my memory, yes. I told him from what I remembered.

...

Q. And the you tell us that she takes off her underwear and you told the Court that she started to lay down on her back and her head was leaning against the door of your car?

A. Like, her back was...she was, like, leaning back towards the door, yes.

Q. And so, again, having regard to the position of your white vehicle, on Exhibit #3, we've established that your vehicle was parked quite close to the scaffolding that was covered in plywood, correct?

A. Okay.

Q. Okay and we've established that there's really not a lot of space on that side of the vehicle, correct?

A. Okay.

Q. And so between S.B. and a reasonable exit, on the driver's side of the vehicle, is you, correct?

A. Correct.

Q. That's a small space...the back seat of the vehicle?

A. Yeah, small, yeah.

Q. It's a confined space.

A. Confined, no. She could move.

Q. But to reasonably exit the back seat of that vehicle, you are between her and the exit, correct?

A. It is correct.

[25] During cross-examination the Crown pointed out that in his statement, instead of saying that S.B. had taken his penis and guided it into her vagina, Mr. Preston said he "kind of just [made] a move" because he felt like they had been consensually touching and kissing each other long enough. They began having sex. He told the police that S.B. did not say anything and was just moaning. The exchange during cross-examination included:

Q. Right. And today you told us that she guided your penis into her vagina.

A. She did.

Q. I want you to look at page 21 of your statement to Cst. Rideout. Now, we...we looked at this page just a minute ago when I was asking you about your comment at the top of the page, "I'm not completely sure what I was wearing". Do you remember that?

A. Okay.

Q. And this is where you're telling Cst. Rideout, "Okay, she's on the waistband of the pant, it's kind of teasing, pulling," and you tell him at line 11, do you see it there? "At that point I'm still just kissing her and stuff like that," do you see that there, Mr. Preston?

A. I do.

Q. And then you say, "At this point," at line 14, "At this point I'm still just kissing her," and then at line 17, "I'm just fingering her," do you see that?

A. I do.

Q. And Cst. Rideout, is kind of saying "Yeah, okay, or yeah or okay," he's kind of...well mostly he's just saying "Yeah," in between you saying these things, right? And then at line 20, Mr. Preston, you say to Cst. Rideout, "And so then I just, like, kind of just make a move, just because it's, like...you know I felt like it's been a while and yeah, so we just started having sex and..." Do you see those four lines there, Mr. Preston?

A. I do.

Q. So there you told Cst. Rideout that you made the move, correct?

A. Uh, I went with motion, which is what I intended to say and that's what I meant – was I was going with the flow.

Q. Well, but what you told him was, "I just like kind of just made a move, make a move."

A. Correct.

Q. And the next thing you say to him is because, "I felt like it's been a while," and so you just started having sex.

A. Yes.

Q. And while you're having penetrative vaginal intercourse with S.B., she's not saying a word, correct?

A. She's moaning.

Q. Okay and you say she's moaning at this point?

A. Yes.

Q. Okay. Now you told us today that, you've told us today that you interpreted that as her, what, wanting you to continue?

A. She was moaning.

Q. So it was just moaning. You don't really know what it means, correct?

A. She had her arms around my back and she was moaning.

[26] Mr. Preston said that while his penis was inside S.B.'s vagina, her arms were around his back, she was moaning, and was making physical movements that suggested what she wanted and what she was consenting to do. He denied that S.B. said that "just because my pants are off does not mean we are going to have sex". He also testified that she never tried to push him off of her and never tried to pull his penis out of her vagina. After five to ten minutes of intercourse, Mr. Preston said, he took his penis out of her and ejaculated on her right thigh. He said he wiped semen off of his penis with his hand and that S.B. sat up and wiped the semen on her thigh off of herself with a piece of clothing.

[27] Mr. Preston testified that he opened the car door to let air in and picked up his clothes. S.B. put her underwear on. He got out of the car to get dressed. S.B. got out of the car in her underwear and walked around to the front seat to get her hoodie and leggings. They left the recreation center and drove back to S.B.'s house, where, according to Mr. Preston, they sat in his car chatting and listening to music for about an hour, until about 4:00 AM, when he told her he was really tired, and S.B. said "cool" and went into her house:

Q. Okay and how long does it take to get back to her house?

A. Between five and seven minutes.

Q. So you get back to her house. What happens?

A. So, I pull up on the curb that's outside her house and we just sit there for a while. We're talking about numerous different things. We're talking about some mental health stuff that we struggle with, some schooling – back in 2019 I was planning on going to school for...for that year – I was just telling her some stuff about that. We talked about her friend, C.S., that conversation was brought up, and she talked to me a little bit about her ex-boyfriend.

Q. And you talk about anything else?

A. No, sir.

Q. So how long are you talking?

A. So we're outside of her house for a good 50 minutes to an hour, just listening to music, again, talking to...about the topics that I referred to just now.

Q. And after talking for, you said, what, 50 minutes to an hour...

A. Yep.

Q. What happens?

A. So I tell her, I'm like, "hey, it's about four o'clock and I'm really tired and I'm going to drive home before, you know, I fall asleep" and she said, "that's...that's cool," and that she was going to have a cigarette before she went to bed and I

said, “watch out for the racoons in case they attack you”, from earlier and she...I waited for her to get into her house, and then I checked a couple messages, and then pulled away.

Q. So she gets out and what do you do?

A. I’m just watching, just making sure she’s getting into her house and once I see her inside of her front door, I check my cell phone just looking at some messages between me and the guys I was playing video games with.

Q. And where did you go?

A. I went straight home.

[28] On cross-examination the accused repeated that he left around 4:00 AM:

Q. Okay. Today you told us that when you drive S.B. home, you were outside of her house for 50 minutes to an hour.

A. Yes.

Q. Yet you also told us that you say to her, “It’s 4 a.m., I’m tired, I’m gonna drive home,” she says, “Cool, I’m going to have a cigarette before bed,” and you said something like, “Watch out for the racoons,” and you waited for her to get into her house.

A. Yes.

Q. Then you told us that you checked your text messages on your phone, after she gets in, and then you pull away.

A. Correct.

[29] During cross-examination Mr. Preston agreed that he suggested to the police that the conversation between he and S.B. may have ended at 3:20 AM:

Q. And if you turn to the next page, Mr. Preston, at line 4 starting on page 73 there...

A. Correct, yes.

Q. ...and Cst. Rideout asked you a follow-up question, he said, “What time would you put this at, roughly?” and your answer was, “I’d say between...it’s either late 2 o’clock, so I’d say between 2:40 between 3:20”.

A. For having this conversation, yes.

Q. And he says, “Okay,” and you say, “It’s between that 40 minute span,” and he says, “Okay,” and you say, “That was near the beginning of the conversation and that really just kind of like...”. Do you recall saying all of that to Cst. Rideout?

A. I do.

Q. And you'd agree with me that the timeframe you gave him there was between 2:40 a.m. and 3:20 a.m., correct?

A. That we were having that conversation, correct.

[30] Mr. Preston said he then drove home to go to sleep. He said he sent S.B. a text just before he went to sleep saying "Keep the hair. I dig it" referencing her pubic hair. He testified that he woke up the next morning around 11:00 AM, checked his phone, saw the text messages from S.B., and his anxiety spiked. Text messages between S.B. and Mr. Preston were tendered by the Crown and adopted by Mr. Preston. Both S.B. and Mr. Preston accepted the text message exchange as an accurate representation of their communications, but both agreed that there were a number of messages sent and received prior to the beginning of the series of texts presented at trial, and none after the final text in this series. The text exchange entered into evidence is as follows, in chronological order:

S.B. Listen, tonight when I said no and that we weren't going to fuck I meant it. I didn't want too, and I asked you to stop multiple times and you didn't.

S.B. So there isn't going to be a next time. I know I was teasing you but teasing you with sex was not my intention, I told you no and I meant it and that's not okay.

K.P. I am sorry

K.P. I made a mistake, and I own to it..

S.B. You can not rape someone and expect sorry to make everything okay

K.P. That hit me so hard.. I had no intentions on that, can I make it up to you, This is very serious to me

K.P. I'm beyond sorry.. I really am..

S.B. How could you make it up to me

K.P. To show you I'm a good person, and that last night wasn't me

S.B. Honestly you can't do anything to make this better

S.B. I told you no and to stop, and I even pushed you off of me multiple times and you didn't care

K.P. I feel like a monster.. from the deepest part of my heart, I am sorry.

S.B. I bet you are sorry but that doesn't change anything

[31] Admissions are a recognized exception to the hearsay rule. Barring exceptional circumstances (which no one has argued exist in this case), they are not subject to a principled analysis. Again, Mr. Preston has admitted and adopted the text exchange as being accurate.

[32] In *R. v. Violette*, 2008 BCSC 422, Romilly J. undertook a thorough analysis of admissions as an exception to the hearsay rule and stated:

63 Admissions, which in the broad sense refer to any statement made by a declarant and tendered as evidence at trial by the opposing party, are admissible as an exception to the rule against hearsay: *R. v. Foreman* (2002), 2002 CanLII 6305 (ON CA), 169 C.C.C. (3d) 489, 62 O.R. (3d) 204 (C.A.), citing J. Sopinka, S. Lederman and A. Bryan, *The Law of Evidence in Canada*, 2nd ed. (Markham, Ont.: Butterworths, 1999), at p. 291. The Court in *Foreman* went on to quote from Sopinka J. in *R. v. Evans*, 1993 CanLII 86 (SCC), [1993] 3 S.C.R. 653, at p. 664:

The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that **what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath"** (Morgan, "Basic Problems of Evidence" (1963), pp. 265-6, quoted in *McCormick on Evidence*, *ibid.*, p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.

64 The basic principles are also captured at pp. 327-328 of *Watt's Manual of Criminal Evidence* 2006:

The admissions doctrine is more likely a product of the adversary system than the result of the application of the principles of necessity and reliability. Admissions are presumed truthful because they have been



made by D and are tendered by P to advance its case. They are received as an exception to the hearsay rule as evidence of the truth of their contents.

Admissions may be made orally, in writing, or by conduct by or on behalf of D. They need not be against D's interest when made. It is left to P to determine whether they will be tendered in evidence. D need not have personal knowledge of the fact(s) admitted, provided s/he exhibits a belief in the truth of the information conveyed. Admissions are evidence both for and against their maker, D, who is entitled to offer explanation(s) for having made them.

**Silence may also constitute an admission, at least where a denial would be the only reasonable course if D were not responsible as alleged.** The principle does not apply, however, where D is in the presence of police at the material time.

**Failure to deny an accusation is not the only form of adoptive admission. Any words, conduct, action or demeanour that amounts to an acknowledgement of the truth of an accusation, in some instances even a denial, may constitute an adoptive admission, depending upon all the circumstances.**

The trial judge must determine whether there is any evidence that D, by words, action, conduct, or demeanour, has adopted a statement made in his/her presence as his/her own, before the trier of fact may find it to be an admission and make use of it as such.

All the circumstances must be considered. The weight of the admission is for the trier of fact.

[Emphasis added]

[33] Justice Chipman reviewed the value of text messages in *R. v. Calnen*, 2015 NSSC 319:

19 In *R. v. Howell*, 2014 BCSC 2196, Justice Griffin made several helpful comments regarding the reliability and probative value of text messages:

[34] Because text messages are in written form, the Nova Scotia Court of Appeal in *Gerrior* found them to have a higher measure of reliability than hearsay evidence of oral cell phone conversations (at para. 46). Because of this, in the circumstances of that case, the requirement of necessity was relaxed (at para. 54), applying *Baldree* at para. 72.

### **Kyle Preston's explanation for the text messages**

[34] On direct examination Mr. Preston said the following about his inculpatory text messages:

Q. And she says, I'm going to read this out to you, "Listen, tonight when I said 'no' and that we weren't going to fuck, I meant it. I didn't want to and I asked you to stop multiple times and you didn't." Then she said, "So there isn't going to be a next time. I know I was teasing you but teasing you with sex was not my intention. I told you 'no' and I meant it and that's not okay". And on the other side of it, that writing is yours, right?

A. Correct.

Q. It says, "I'm sorry. I made a mistake and I own to it." What are you sorry about?

A. So, when waking up and reading the text message, my anxiety just...it spiked and I was...I was very confused within the moment because I remembered clearly the events that took the night before – or earlier on in the morning. And it was clear that we had consensual sex and when...when I read that text message, I was...I was very...I was, I was scared. My anxiety...it just took over and I replied within the moment, without taking a breather and...

Q. Okay you replied within the moment but here's what you're saying, "I made a mistake and I own to it".

A. Yes.

Q. What are you owning to?

A. Honestly, I wasn't owning to anything. Like I said, I was dealing with a major anxiety attack and whenever I deal with anxiety attacks, I always look to blame myself for every situation – even when I shouldn't. I...I blamed myself for not...I just, I completely blamed myself when I shouldn't have and I wanted to de-escalate the situation from going, from getting any worse and I apologized for it.

Q. So then the next bubble says, "You cannot rape someone and expect sorry to make everything okay," and the reply from you is, "That hit me hard, I had no intentions on that. Can I make it up to you? This is very serious to me," and then the next bubble, "I'm beyond sorry, I really am". S.B. just said to you in a text that you raped her.

A. Yes.

Q. And you're sorry?

A. I felt bad for her and the situation.

Q. What were you feeling bad about?

A. Whenever I'm anxious, I feel bad for anybody. It's just...it's just a genuine trait that I have, that I feel sorry for her and the situation, that she's upset. And my intentions were...were clear. They were clear that I had no intentions of ever hurting her and to recall the events of the night before, that I never did hurt her, and it goes back to me blaming myself completely.

Q. And on the second page of Exhibit 2, there's another bubble from her, the darker colour, "How could you make it up to me?" and you say, "To show you I'm a good person and that last night wasn't me". What do you mean when you say that "last night wasn't me"?

A. I was very confused with my anxiety, why I was receiving the text messages that I was receiving, and my reply was influenced based on my anxiety. I knew clear as day that the night before, of the events that happened that night, and what went on...

Q. And why weren't you saying that with replying to that text message?

A. Because when I get anxious, I look to blame myself over anybody else.

Q. And then the next two bubbles, in dark colour, "Honestly, you can't do anything to make this better. I told you 'no' and to stop and I even pushed you off of me multiple times and you didn't care" and the lighter coloured bubble, "I feel like a monster. From the deepest part of my heart, I am sorry." Can you try to explain to the Court why you're saying to her, "I feel like a monster"?

A. I go back to blaming myself and I continually, just continuously, get worse as the conversation proceeds and I continue to want to blame myself for the situation and not just stopping and taking a moment to breathe and allow myself to...to think properly within the moment, instead of reacting with emotion and I was reacting with emotion and I felt extremely bad for her.

Q. Look what she's saying to you though, "I told you 'no' and to stop and I even pushed you off me multiple times and you didn't care". Why aren't you saying that that didn't happen?

A. Honestly, I don't know why I didn't reply within the moment. I completely discarded her text messages in total and I just put the blame, the guilt on myself because of my mental health. It's been something that, you know, I always do to myself because I...I value other people's happiness more than myself, than my own happiness.

Q. And so the last bubble in these text messages, on the last page, is S. saying, "I bet you are sorry but that doesn't change anything". Was that the last communication between you and S.?

A. It was.

[35] During cross-examination Mr. Preston was asked about his text messages, and said:

Q. And, Mr. Preston, you said to Cst. Rideout when you were speaking with him, he...he had these text messages, right, and he talked to you at length about them, right?

A. He did.

Q. Okay and you said to him at the time about these text messages, you said, "These text messages are really not good". Do you remember saying that to Cst. Rideout?

A. Yep.

Q. And I'm kind of paraphrasing a little bit, but you kind of said to him, yeah especially with these text messages it's not a good situation, right?

A. Uh, I mean I said to Mr. Rideout that the text messages don't appear good.

Q. Okay and Cst. Rideout, like Mr. Singleton, said, "well, what do these mean?" because when I look at them you're not denying what she's saying, correct?

A. Um, I'm not denying. I'm also not in the right mind frame when I'm replying to these text messages. Like I said before, I struggle really hard with anxiety and my anxiety takes over and I start blaming myself for everything, no matter what, and I never addressed anything in the text messages. I repeatedly said I was sorry and I felt really bad and...

Q. So, I know you think you're saying this today, but again I'm going to direct you to your statement at page 62.

A. Yeah.

Q. When Cst. Rideout asked you about these text messages, at line 13.

A. What page was it?

Q. 62.

A. 62, sorry. And what line was it?

Q. Line 13.

A. Okay.

Q. You said, "Because then the next morning I was like, well, she never said this, you know, when I also woke up, which really, that's no excuse for how I responded," and then you said, "You know, I was extremely tired and I was a bit dazed as well". Do you recall saying that to Cst. Rideout?

A. I do.

Q. So, in September 2008 you said that you responded that way because you were tired and dazed.

A. I also expressed to Mr. Rideout that, you know, a lot of my...the response to my text messages was because I felt bad and that I do struggle with anxiety.

Q. And, I'm just going to suggest to you, Mr. Preston, that that's true. That your response to those text messages don't really make a lot of sense, do they?

A. No, they don't.

Q. Based on your evidence today?

A. That's not true. The text messages really don't make sense. You know, I'm more or less just blaming myself the entire time and I'm just in a frenzy. I don't...I don't...I don't address the issues that are being brought up and I'm just repeatedly saying, "Sorry".

Q. Okay and you say you were in a frenzy when you received these text messages?

A. What I mean by a frenzy, I mean I was extremely anxious. Sorry, that was a poor word.

Q. Alright, because after you received these text messages, you told Cst. Rideout you went back to sleep for an hour. Correct?

A. I went back to sleep for a period of time, yes.

Q. Okay, but, so you weren't so anxious that you couldn't sleep after receiving them?

A. So, sleeping helps me in total. You know, anxiety and depression hit me hard and the one thing that is my getaway is my bed and sleeping. That's...over the years battling my mental health, I've spent a lot of time sleeping. Sleeping is something that calms me down and it makes me feel...makes me feel secure and safe again, like...

Q. And, Mr. Preston, you didn't say anything like that to Cst. Rideout and I want to direct your attention specifically to page 87 of your statement, okay? At the very top of the page, you said, "...I eventually fell back to asleep," and you're referring to the time period the next morning after you received these extremely serious text messages from S.B., correct?

A. Correct.

Q. And he says, "Right," and you say, "I didn't even know if...I have nothing really to say about me coming back to sleep other than, you know, I was tired".

A. I was. I was extremely tired and anxious.

Q. That's...that was your answer to Cst. Rideout in September of 2018, correct?

A. That is correct.

Q. And he says, "Yeah, yeah," and then you say, "I was awake for every sort of response, though".

A. So, back and forth when I was up and receiving the responses.

Q. And you told us to today you have no explanation for why you didn't reply when S.B. sent you those messages, no explanation for why you didn't reply, "That didn't happen. I didn't do this," any kind of denial whatsoever.

A. Could you repeat that again, sorry?

Q. Yeah, I'm sorry, that was a bit of a clunky question. We're late in the day. But you don't...there's no explanation for that, for why you wouldn't deny it, or say "That didn't happen". There's not reason.

A. Yes and I refer back to my mental health. I...I apologized 'cause, like I said, I blamed myself and I just...I continued to blame my self. You know I just want to de-escalate the situation and make things okay, 'cause my goal is to never intend to hurt somebody.

### **Reasonable doubt and the presumption of innocence**

[36] Section 11(d) of the *Canadian Charter of Rights and Freedoms* provides that a person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Mr. Preston is presumed innocent of the charge, unless the Crown proves each element beyond a reasonable doubt. Speaking for the majority in *R. v. Lifchus*, [1997] 3 S.C.R. 320, Cory J. summarized the principles of reasonable doubt, as it should be explained to a jury:

36 ... It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit. [Emphasis in original.]

[37] In *R. v. Starr*, 2000 SCC 40, Iacobucci J. stated for the majority that "an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities" (para. 242). Mere probability of guilt is never enough in a criminal matter. The Crown must prove the guilt of an accused person, in this case Kyle Preston,

beyond a reasonable doubt, which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

### **Credibility and reliability**

[38] In this case, I have to decide if I am satisfied beyond a reasonable doubt that the Crown has proven that Mr. Preston sexually assaulted S.B. This will require consideration of the credibility of witnesses, including S.B. and Mr. Preston. In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152, the majority of the British Columbia Court of Appeal discussed credibility as follows:

11 The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

[39] In *Baker v. Aboud*, 2017 NSSC 42, Forgeron J. summarized the principles governing credibility assessment (some citations omitted):

13 Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of *Baker-Warren v. Denault*, 2009 NSSC 59, as approved in *Hurst v. Gill*, 2011 NSCA 100, which guidelines include the following:

\* Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. c. Gagnon*, 2006 SCC 17 (S.C.C.), para.20. ...  
 "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), para. 49.

\* There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, *Novak Estate, Re, supra*.

\* Demeanor is not a good indicator of credibility: *R. v. Norman*(1993), 1993 CanLII 3387 (ON CA), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.

\* Questions which should be addressed when assessing credibility include:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re, supra*;
- b) Did the witness have an interest in the outcome or were they personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which they testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorny...*;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[40] The majority in *Lifchus* acknowledged that “certain doubts, although reasonable, are simply incapable of articulation” and emphasized that a “juror should not be made to feel that the overall, perhaps intangible, effect of a witness’s demeanor cannot be taken into consideration in the assessment of credibility” (para. 29).

[41] A related principle to credibility is reliability. The relationship between the two concepts was explained in *Cameco Corporation v. The Queen*, 2018 TCC 195:

[11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time. In *R. v. Norman*, 1993 CanLII 3387 (ON CA), [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:

. . . The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable.



Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. . . .

[42] There were some inconsistencies between S.B.'s statements to the police and her trial testimony. For example, her police statement indicates that she told the police she screamed, punched and pushed Mr. Preston during intercourse, whereas S.B. testified that she pushed on him, but did not scream or punch him.

[43] There was also some conflict between S.B.'s trial testimony and the video evidence. In particular she testified that she did not believe she was wearing underwear. The video, while grainy, appears to show her wearing underwear as she gets out of the back seat and walking around the car to the front seat. That same video contradicts her testimony that she put on her leggings in the back seat before getting out of the car, as she can be seen walking around the car without leggings on before getting into the front seat.

[44] As noted, there were also inconsistencies between Mr. Preston's police statement and his trial testimony, in particular in relation to some of the details regarding how intercourse was initiated and why he sent apologetic text messages.

## **Consent**

[45] Section 265 of the *Criminal Code* describes the offence of assault. It states:

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly...

### **Application**

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

### **Consent**

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

Accused's belief as to consent

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[46] The offence of sexual assault is created by s. 271. Sections 273.1 and 273.2 of the *Criminal Code* deal with consent. They state:

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

Consent

(1.1) Consent must be present at the time the sexual activity in question takes place.

Question of law

(1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

No consent obtained

(2) For the purpose of subsection (1), no consent is obtained if

...

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Subsection (2) not limiting

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from

(i) the accused's self-induced intoxication,

(ii) the accused's recklessness or wilful blindness, or

(iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or

(c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

[47] I note that sections 273.1 and 273.2 have been amended since the events with which this decision is concerned: see S.C. 2018, c. 29. I am satisfied that these amendments did not change the substantive law applicable under these sections, but only brought them into line with the interpretation of these provisions as developed by the courts: see, e.g., *R. v Gray*, 2019 BCSC 1327, at paras. 65-68.

### **Essential Elements of Sexual Assault**

[48] In *R. v. Al-Rawi*, 2018 NSCA 10, Beveridge J.A. reviewed the essential elements of sexual assault, as set out in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. He discussed the elements as follows:

[19] *R. v. Ewanchuk* ... is the seminal decision on the elements the Crown is required to prove in a sexual assault prosecution. The decision cemented the demise of implied consent and reinforced the necessity of focussing on the subjective state of mind of the complainant to determine if he or she did not consent to the sexual touching.

[20] The *actus reus* of the offence is simply the intentional sexual touching of the complainant and the absence of consent. Justice Major, for the majority, wrote:

[23] A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

...

[25] The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour...

[26] The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred... [Emphasis added.]

[49] Section 273.1 defines "consent" as "the voluntary agreement of the complainant to engage in the sexual activity in question." The majority in *R. v. Hutchinson*, 2014 SCC 19, described a two-step process for analysing consent to sexual activity. Chief Justice McLachlin and Cromwell J. said:

4 ... The first step is to determine whether the evidence establishes that there was no "voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3) defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant's ostensible consent or participation... Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2)(c)).

[50] In *Al-Rawi*, Justice Beveridge explained the significance of the complainant's subjective state of mind in the context of the *actus reus*:

[42] With respect, there is nothing in the words of s. 273.1(1) that suggest the Crown need establish communication of a voluntary agreement to prove the *actus reus* of the offence of sexual assault. The issue of communication, or lack thereof, of a voluntary agreement is highly relevant to the issue of the *mens rea* of the offence—that the accused knew that the complainant did not consent to the activity in question—particularly in light of the statutory requirement in s. 273.2 of the *Code* that an accused took reasonable steps to ascertain the existence of consent.

...

[48]... Consent is entirely an inquiry into the subjective state of mind of the complainant, not about what she did or did not communicate. Major J. succinctly summarized this principle. I quoted from his judgment above, but it is convenient to repeat it:

[26] The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred...

[49] This is also reinforced by the majority reasons for judgment later written by McLachlin C.J. in 2011 in *R. v. J.A.*, *supra* where she stressed the difference between the *actus reus* and *mens rea* of the offence of sexual assault. The issue of

communication of consent is only relevant to the issue of *mens rea*. She explained:

[37] The provisions of the *Criminal Code* that relate to the *mens rea* of sexual assault confirm that individuals must be conscious throughout the sexual activity. Before considering these provisions, however, it is important to keep in mind the differences between the meaning of consent under the *actus reus* and under the *mens rea*... Under the *mens rea* defence, the issue is whether the accused believed that the complainant *communicated consent*. Conversely, the only question for the *actus reus* is whether the complainant was subjectively consenting in her mind. The complainant is not required to express her lack of consent or her revocation of consent for the *actus reus* to be established.

[51] In *R. v. Barton*, 2019 SCC 33, Moldaver J., for the majority, again reviewed the role of consent in a sexual assault analysis:

89 Consent is treated differently at each stage of the analysis. For purposes of the *actus reus*, "consent" means "that the complainant in her mind wanted the sexual touching to take place"... Thus, at this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent -- plain and simple... At this point, the *actus reus* is complete. The complainant need not express her lack of consent, or revocation of consent, for the *actus reus* to be established...

90 For purposes of the *mens rea*, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, "consent" means "that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused"... Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions"... [Citations omitted.]

[52] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, Major J., for the majority, commented on the process of analyzing credibility with respect to consent:

61 In sexual assault cases which centre on differing interpretations of essentially similar events, trial judges should first consider whether the complainant, in her mind, wanted the sexual touching in question to occur. Once the complainant has asserted that she did not consent, the question is then one of credibility. In making this assessment the trier of fact must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant. If the trier of fact is satisfied beyond a reasonable doubt that the complainant did not in fact

consent, the *actus reus* of sexual assault is established and the inquiry must shift to the accused's state of mind.

62 If there is reasonable doubt as to consent, or if it is established that the complainant actively participated in the sexual activity, the trier of fact must still consider whether the complainant consented because of fear, fraud or the exercise of authority as enumerated in s. 265(3). The complainant's state of mind in respect of these factors need not be reasonable. If her decision to consent was motivated by any of these factors so as to vitiate her freedom of choice the law deems an absence of consent and the *actus reus* of sexual assault is again established.

[53] The relevant time period for the consent analysis is when the sexual acts occurred, not before or after: *R. v. Rand*, 2012 ONCA 731, at para. 17. The majority of the Supreme Court of Canada said, in *R. v. J.A.*, 2011 SCC 28:

[46] The only relevant period of time for the complainant's consent is while the touching is occurring: *Ewanchuk*, at para. 26. The complainant's views towards the touching before or after are not directly relevant. An offence has not occurred if the complainant consents at the time but later changes her mind (absent grounds for vitiating consent). Conversely, the *actus reus* has been committed if the complainant was not consenting in her mind while the touching took place, even if she expressed her consent before or after the fact.

[54] In *R. v. J.A.*, [2011] 2 S.C.R. 440, McLachlin C.J. explained for the majority that there is no such thing as advance consent in sexual assault cases:

[65] In the end, we are left with this. Parliament has defined sexual assault as sexual touching without consent. It has dealt with consent in a way that makes it clear that ongoing, conscious and present consent to "the sexual activity in question" is required. This concept of consent produces just results in the vast majority of cases. It has proved of great value in combating the stereotypes that historically have surrounded consent to sexual relations and undermined the law's ability to address the crime of sexual assault. In some situations, the concept of consent Parliament has adopted may seem unrealistic. However, it is inappropriate for this Court to carve out exceptions when they undermine Parliament's choice. In the absence of a constitutional challenge, the appropriate body to alter the law on consent in relation to sexual assault is Parliament, should it deem this necessary.

***R. v. W.(D.)***

[55] Kyle Preston testified. The Crown also relied on text messages exchanged between Mr. Preston and S.B. In *R. v. W.(D.)*, [1991] 1 S.C.R. 742, [1991] 1 S.C.R. 742, Cory J., for the majority, instructed triers of fact on how to apply the burden of proof where evidence has been led on behalf of the accused. Noting that the “trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses” (para. 27), he set out the following sequence, at para. 28:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused...

[56] In *R. v. Dinardo*, 2008 SCC 24 [2008] 1 S.C.R. 788, Charron J., for the court, commented on the application of the *W.(D.)* analysis:

23 The majority rightly stated that there is nothing sacrosanct about the formula set out in *W. (D.)*. Indeed, as Chamberland J.A. himself acknowledged in his dissenting reasons, the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W.(D.)*; it will depend on the context... What matters is that the substance of the *W.(D.)* instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused’s evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused’s guilt beyond a reasonable doubt...

[57] Therefore, I must undertake the *W.(D.)* analysis in this case.

**Analysis**

***Actus reus***

[58] In considering whether the *actus reus* has been proven beyond a reasonable doubt, the principal issue in this case is whether the complainant subjectively

consented. This is a separate question from whether the accused had an honest but mistaken belief in communicated consent, which goes to the *mens rea* of the offence.

[59] S.B. having sent Mr. Preston a Snapchat message that said “We should fuck tonight” does not carry the day regarding her consent later to unprotected intercourse. S.B. could change her mind about any and all sexual activity with Mr. Preston at any time before or during the sexual activity.

[60] S.B. testified that she did not consent to unprotected vaginal intercourse. Mr. Preston said she did consent. There were a number of details regarding the evening that S.B. either did not recall or downplayed. She did not volunteer during her direct evidence that she sent Mr. Preston a Snapchat that morning saying “We should fuck tonight”. On cross-examination she said she could not remember if she sent that Snapchat, although she did not deny it. While the actual comment “We should fuck tonight” has little impact on my assessment of consent, since there is no such thing as advance consent to sexual activity and S.B. could revoke her consent at any time, her testimony about the sending of that Snapchat message does impact on her credibility. Would someone would forget sending that message to the person they say committed a sexual assault, immediately before the alleged sexual assault?

[61] Equally, I do not believe that S.B. was reluctant to go for a drive with Mr. Preston, as she suggested in her testimony. Her evidence was that she was bored, invited him over at 1:30 AM, and got into his car when he arrived. As Mr. Preston said, I believe that she agreed to go for a drive, and that she agreed to go parking at the recreation center. Those issues do impact S.B.’s credibility and reliability.

[62] As far as who kissed who first, I am not sure (they each say the kissing was initiated by the other) and it does not matter in relation to the issue of consent. Discrepancies in their stories on peripheral matters can still impact on credibility and/or reliability. It is clear that both parties engaged in consensual kissing and touching in the front seat of the car and that both of them voluntarily eventually moved to the back seat of the car.

[63] With regard to some of the minutiae of the details that occurred after the alleged sexual assault, I believe that each of the nineteen-year-olds involved have some minor deficits in their memories. From a review of the video, I find that S.B. got out of the back seat of the vehicle dressed in her bra and underwear. So, contrary to her testimony, she was wearing underwear and she did not get dressed



in the back seat of the vehicle. Those minor discrepancies do not seriously erode her credibility or her reliability.

[64] With regard to how long the two stayed in Mr. Preston's car when they arrived back at S.B.'s house, there are several pieces of evidence that I must consider. Mr. Preston said that they stayed in his car chatting for about an hour. S.B. says that she got out of his vehicle as soon as she got home. Text messages between S.B. and her aunt, D.C. were entered into evidence. The first text message was sent by D.C. to S.B. at 4:32 AM and says:

“I love you♥♥You should not be dealing with this alone so please tell me you told your mother?”

[65] In her testimony, D.C. said that she spoke to S.B. that morning at 3:30 AM. She said she was asleep and missed the first call from S.B., but she answered the second call, during which S.B. was upset, crying and hard to understand. She said they spoke for about fifteen minutes. D.C. said that she could not sleep after the call and an hour later they exchanged text messages. This time frame is consistent with S.B.'s testimony that she went right into her house when Mr. Preston drove her home. However, D.C. clearly had animus toward Mr. Preston. She believed that he sexually assaulted S.B. and as a result told him in the workplace that she did not like him. This has some impact on D.C.'s credibility.

[66] Similarly, text messages between S.B. and her friend, C.S., were in evidence. They were only proposed as relevant to show the times select text messages were sent and received. I am not considering any remarks in those text messages from S.B. that could be described as prior consistent statements. Nor do I consider the substance of any of the texts attributed to C.S., since she did not testify. They were only referenced to show the relevant time stamps and only certain of the texts have corresponding time stamps:

He wants to fuck and I was like on my period nope sorry		1:40 AM
	hahahaha	1:46 AM
You going to baker's		2:14 AM
	yes	2:27 AM
Okay		2:28 AM

I need you	2:51 AM
To come to my place	2:51 AM
I'm not ok	2:52 AM
At all	2:53 AM

[67] I do not find the texts between S.B. and C.S. of any assistance in determining whether the Crown has proven the charge against Mr. Preston beyond a reasonable doubt and do not rely on them at all in making my decision.

[68] S.B. invited Mr. Preston over to her place via electronic messaging at approximately 1:30 AM. He picked her up about 1:40 AM. According to the surveillance video, they arrived at the recreation center to park at 2:04:26 AM. They got into the back seat at 2:40:09AM. They returned to the front seat at 2:54:59 AM and drove away from the recreational centre at 2:56:09 AM.

[69] In relation to the texts between S.B. and Mr. Preston, S.B. admitted during cross-examination not only that she had not disclosed to the police that she had sent Mr. Preston a Snapchat message saying "We should fuck tonight" before the incident, but also that she did not provide the police with the first texts between herself and Mr. Preston immediately after he dropped her off. Mr. Preston said that he texted "Keep the hair. I dig it". S.B. said that she thought he had said something to the effect that they should get together again soon. In explaining why she had only sent the police selected texts from her various exchanges with Mr. Preston, S.B. said:

Q. And you didn't send him in the text messages between yourself and Kyle earlier that evening?

A. No.

Q. When you were sending him the video of the raccoons, right? You didn't send that?

A. No. I didn't think that it was relevant.

Q. And you didn't send the text messages before you switched to Snapchat, wherein you started talking about getting together that night?

A. Correct.

Q. And you didn't think those were relevant either?

A. No, because they didn't have anything to do with what had went on that night after he had picked me up.

[70] S.B.'s failure to mention her initial Snapchat message and her failure to provide to the police the first messages between herself and Mr. Preston after she returned to her home, do impact on her overall credibility.

[71] Notably, regarding the critical issue, S.B. said that she did not consent to intercourse. Her testimony was consistent and unshaken on this point.

[72] While Mr. Preston's testimony regarding some details accords with the video evidence and is reliable regarding those details, in relation to his testimony on the critical issue of consent, his credibility is poor. Of significance is the discrepancy between his initial statement to the police regarding how intercourse occurred, his explanation of why he sent the text messages in response to S.B.'s, and his testimony at trial on these same issues.

[73] The text messages sent by S.B. are clear and unambiguous:

S.B.: Listen, tonight when I said no and that we weren't going to fuck I meant it. I didn't want too, and I asked you to stop multiple times and you didn't.

S.B.: So there isn't going to be a next time. I know I was teasing you but teasing you with sex was not my intention, I told you no and I meant it and that's not okay.

[74] S.B. states in those messages that she teased Mr. Preston, but also says that she told him that they were not going to have intercourse several times, and says she told him "no" as he was attempting intercourse. She said she asked him to stop multiple times and he did not stop. Instead of denying these serious accusations, Mr. Preston apologized in writing and said he had made a mistake:

K.P.: I am sorry

K.P.: I made a mistake, and I own to it..

[75] If that first accusation by S.B. was not clear enough, she then sent a text directly accusing Mr. Preston of rape:

S.B.: You can not rape someone and expect sorry to make everything okay

[76] Mr. Preston again apologized and offered to make it up to her:

K.P.: That hit me so hard.. I had no intentions on that, can I make it up to you, This is very serious to me

K.P.: I'm beyond sorry.. I really am..

[77] To which S.B. asked:

S.B.: How could you make it up to me

[78] Again, knowing that he had been accused of forcing sex on S.B. after she had said “no” multiple times, along with the accusation of rape, Mr. Preston said that the night before was out of character for him:

K.P.: To show you I’m a good person, and that last night wasn’t me

[79] S.B. reiterated that she had said no and tried to push him off of her:

S.B.: Honestly you can’t do anything to make this better

S.B.: I told you no and to stop, and I even pushed you off of me multiple times and you didn’t care

[80] Mr. Preston again apologized and called himself a monster:

K.P.: I feel like a monster.. from the deepest part of my heart, I am sorry.

S.B.: I bet you are sorry but that doesn’t change anything

[81] Mr. Preston said in court that he only apologized to S.B. because he has depression and anxiety and as a result takes the blame and attempts to de-escalate stressful and confrontational situations. Yet he agreed that when he was asked the same questions by the police in September 2018, he gave very different answers.

[82] When the issue of the text messages is combined with Mr. Preston’s explanation of how the unprotected intercourse occurred, it further erodes Mr. Preston’s credibility on the issue of consent. At trial he said that S.B. had taken off her own pants (with help from him getting them over her ankles), had taken off her own underwear, had pulled on his shorts, and had taken hold of his penis and guided it into her vagina. If true, that would be clear evidence of consent on the part of S.B. However, as noted, during cross-examination of Mr. Preston the following exchange occurred:

Q. And Cst. Rideout, is kind of saying “Yeah, okay, or yeah or okay,” he’s kind of...well mostly he’s just saying “Yeah,” in between you saying these things, right? And then at line 20, Mr. Preston, you say to Cst. Rideout, “And so then I just, like, kind of just make a move, just because it’s, like...you know I felt like

it's been a while and yeah, so we just started having sex and..." Do you see those four lines there, Mr. Preston?

A. I do.

Q. So there you told Cst. Rideout that you made the move, correct?

A. Uh, I went with motion, which is what I intended to say and that's what I meant – was I was going with the flow.

Q. Well, but what you told him was, "I just like kind of just made a move, make a move."

A. Correct.

Q. And the next thing you say to him is because, "I felt like it's been a while," and so you just started having sex.

A. Yes.

[83] Mr. Preston's credibility was poor in relation to his explanation in court as to how intercourse occurred. I reject his trial testimony as to why he said what he said in the text messages. Considering the testimony of S.B., combined with the evidence of the text messages between S.B. and Mr. Preston, along with the conflict between Mr. Preston's explanation in his police statement as compared with his testimony, I am convinced beyond a reasonable doubt that S.B. did not consent to intercourse. The *actus reus* of sexual assault has been proven by the Crown beyond a reasonable doubt.

### ***Mens Rea***

[84] This is a case where there is completely divergent evidence from the Crown and Defence regarding consent. I am convinced beyond a reasonable that the *actus reus* has been proven by the Crown. With regard to the *mens rea* for sexual assault, I do not believe Mr. Preston's testimony as to his state of mind when intercourse took place. His admissions in the text messages to S.B., along with his statement to the police about the critical issues, all support S.B.'s version of the events. I am also convinced beyond a reasonable doubt that the Crown has proven this element of the crime of sexual assault.

[85] In case I am wrong, and this situation requires an analysis under the *mens rea* component of the offence for honest but mistaken belief in communicated consent, I will consider that defence.

***Honest but mistaken belief in communicated consent***

[86] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, Major J. considered the parameters of honest but mistaken belief in consent:

52 Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. In *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 79, the Court stated:

An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: Criminal Code, s. 273.2(a)(ii).

[87] Justice Major went on to discuss *mens rea* and consent:

63 Turning to the question of *mens rea*, it is artificial to require as a further step that the accused separately assert an honest but mistaken belief in consent once he acknowledges that the encounter between him and the complainant unfolded more or less as she describes it, but disputes that any crime took place... In those cases, the accused can only make one claim: that on the basis of the complainant's words and conduct he believed her to be consenting. This claim both contests the complainant's assertions that in her mind she did not consent, and posits that, even if he were mistaken in his assessment of her wishes, he was nonetheless operating under a morally innocent state of mind. It is for the trier of fact to determine whether the evidence raises a reasonable doubt over either her state of mind or his.

64 In cases such as this, the accused's putting consent into issue is synonymous with an assertion of an honest belief in consent. If his belief is found to be mistaken, then honesty of that belief must be considered. As an initial step the trial judge must determine whether any evidence exists to lend an air of reality to the defence. If so, then the question which must be answered by the trier of fact is whether the accused honestly believed that the complainant had communicated consent. Any other belief, however honestly held, is not a defence.

65 Moreover, to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to

point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.

66 Cases involving a true misunderstanding between parties to a sexual encounter infrequently arise but are of profound importance to the community's sense of safety and justice. The law must afford women and men alike the peace of mind of knowing that their bodily integrity and autonomy in deciding when and whether to participate in sexual activity will be respected. At the same time, it must protect those who have not been proven guilty from the social stigma attached to sexual offenders.

[88] In *Barton*, Moldaver J. expanded on *Ewanchuk*, holding that the defence should be referred to as honest but mistaken belief in communicated consent:

91 This Court has consistently referred to the relevant defence as being premised on an "honest but mistaken belief in consent" ..., and the *Code* itself refers to the accused's "belief in consent" (s. 273.2(b) (heading)). However, this Court's jurisprudence is clear that in order to make out the relevant defence, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct... [Emphasis added.] As L'Heureux-Dubé J. stated in *Park*, "[a]s a practical matter, therefore, the principal considerations that are relevant to this defence are (1) the complainant's actual communicative behaviour, and (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary" (para. 44 [Emphasis in *Park*.]).

92 Therefore, in my view, it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in communicated consent". This refinement is intended to focus all justice system participants on the crucial question of communication of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent.

93 Focusing on the accused's honest but mistaken belief in the communication of consent has practical consequences. Most significantly, in seeking to rely on the complainant's prior sexual activities in support of a defence of honest but mistaken belief in communicated consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that she communicated consent to the sexual activity in question at the time it occurred.... As I will explain, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact. [Emphasis added.]

94 However, great care must be taken not to slip into impermissible propensity reasoning... The accused cannot rest his defence on the false logic that the complainant's prior sexual activities, by reason of their sexual nature, made her

more likely to have consented to the sexual activity in question, and on this basis he believed she consented. This is the first of the "twin myths", which is prohibited under s. 276(1)(a) of the *Code*. [Some citations omitted.]

[89] In discussing the parameters of the defence, Moldaver J. outlined the need for reasonable steps to ascertain consent:

104 Section 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent -- no reasonable steps, no defence. It has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time... Notably, however, s. 273.2(b) does not require the accused to take "all" reasonable steps, unlike the analogous restriction on the defence of mistaken belief in legal age imposed under s. 150.1(4) of the *Code*... [Citations omitted.]

[90] As to what constitutes "reasonable steps", Moldaver J. stated that the "inquiry is highly fact-specific, and it would be unwise and likely unhelpful to attempt to draw up an exhaustive list of reasonable steps or obscure the words of the statute by supplementing or replacing them with different language" (para. 106). He did, however, consider the parameters:

107 That said, it is possible to identify certain things that clearly are not reasonable steps. For example, steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law... Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step... Accordingly, an accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step. This is a particularly acute issue in the context of unconscious or semi-conscious complainants...

108 It is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated. For example, the more invasive the sexual activity in question and/or the greater the risk posed to the health and safety of those involved, common sense suggests a reasonable person would take greater care in ascertaining consent. The same holds true where the accused and the complainant are unfamiliar with one another, thereby raising the risk of miscommunications, misunderstandings, and mistakes. At the end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case.



109 Overall, in approaching the reasonable steps analysis, trial judges and juries should take a purposive approach, keeping in mind that the reasonable steps requirement reaffirms that the accused cannot equate silence, passivity, or ambiguity with the communication of consent. Moreover, trial judges and juries should be guided by the need to protect and preserve every person's bodily integrity, sexual autonomy, and human dignity. Finally, if the reasonable steps requirement is to have any meaningful impact, it must be applied with care -- mere lip service will not do. [Citations omitted.][Emphasis added.]

[91] S.B. and Mr. Preston were not well known to each other. This was their first intimate encounter. Unprotected vaginal sex is a highly invasive form of activity. In his police statement, Mr. Preston said that in the midst of other consensual sexual activity, he essentially felt things had gone on long enough and “went for it”. At trial, he said that S.B. guided his penis into her vagina with his hand. To the exact contrary, S.B. said that she said “no” on multiple occasions to intercourse and tried several times to pull Mr. Preston’s penis out of her vagina.

[92] Considering the text messages, in combination with the conflict between his statement to the police on the question of why he proceeded with intercourse and why he said what he did in the text messages in comparison with his trial testimony, I do not believe Mr. Preston’s trial testimony on these critical issues. There was no honest but mistaken communicated consent to sexual intercourse. Mr. Preston persisted in repeatedly putting his penis in S.B.’s vagina after she clearly told him not to, while she was actively resisting by trying to physically remove it with her hand and pushing on his chest. The Crown has proven the *mens rea* element beyond a reasonable doubt.

### **Remaining essential elements**

[93] With regard to the remaining essential elements, they are conceded by Mr. Preston by way of an agreed statement of facts, which states:

1. The time and date of the offence – the early morning hours of August 4, 2018 – is admitted.
2. The identity of the accused is admitted.
3. The jurisdiction of the offence – 1492 St. Margaret’s Bay Road, Halifax, Nova Scotia – is admitted..

**R. v. W.(D.) analysis**

[94] As noted earlier, the Crown entered Mr. Preston's text communications with S.B. into evidence as part of their case. Mr. Preston also testified. Therefore, the test as laid out in *W.(D.)* and the related cases applies to my analysis.

***First, if you believe the evidence of the accused, obviously you must acquit***

[95] I do not believe Kyle Preston's testimony that S.B. consented to vaginal intercourse, nor do I believe his testimony as to why he said what he said in the critical text messages.

***Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit***

[96] Mr. Preston's evidence does not leave me with a reasonable doubt regarding S.B.'s lack of consent to vaginal intercourse.

***Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused***

[97] On the basis of all of the evidence presented at trial, I am convinced beyond a reasonable doubt that Mr. Preston had non-consensual vaginal intercourse with S.B. I am equally sure, and therefore convinced beyond a reasonable doubt, that there was no honest but mistaken belief in communicated consent in relation to the vaginal intercourse. S.B. consented to much of the sexual activity with Mr. Preston. However, she told him that she did not consent to vaginal intercourse. When he felt things had gone on long enough, despite S.B.'s lack of consent, he then had forced vaginal intercourse with her. Afterwards, when S.B. confronted him very clearly in writing via text about forcing non-consensual intercourse on her, Mr. Preston not only did not deny an accusation of rape, but apologized.

**Conclusion**

[98] The Crown has proven beyond a reasonable doubt that Kyle Preston committed a sexual assault on S.B.